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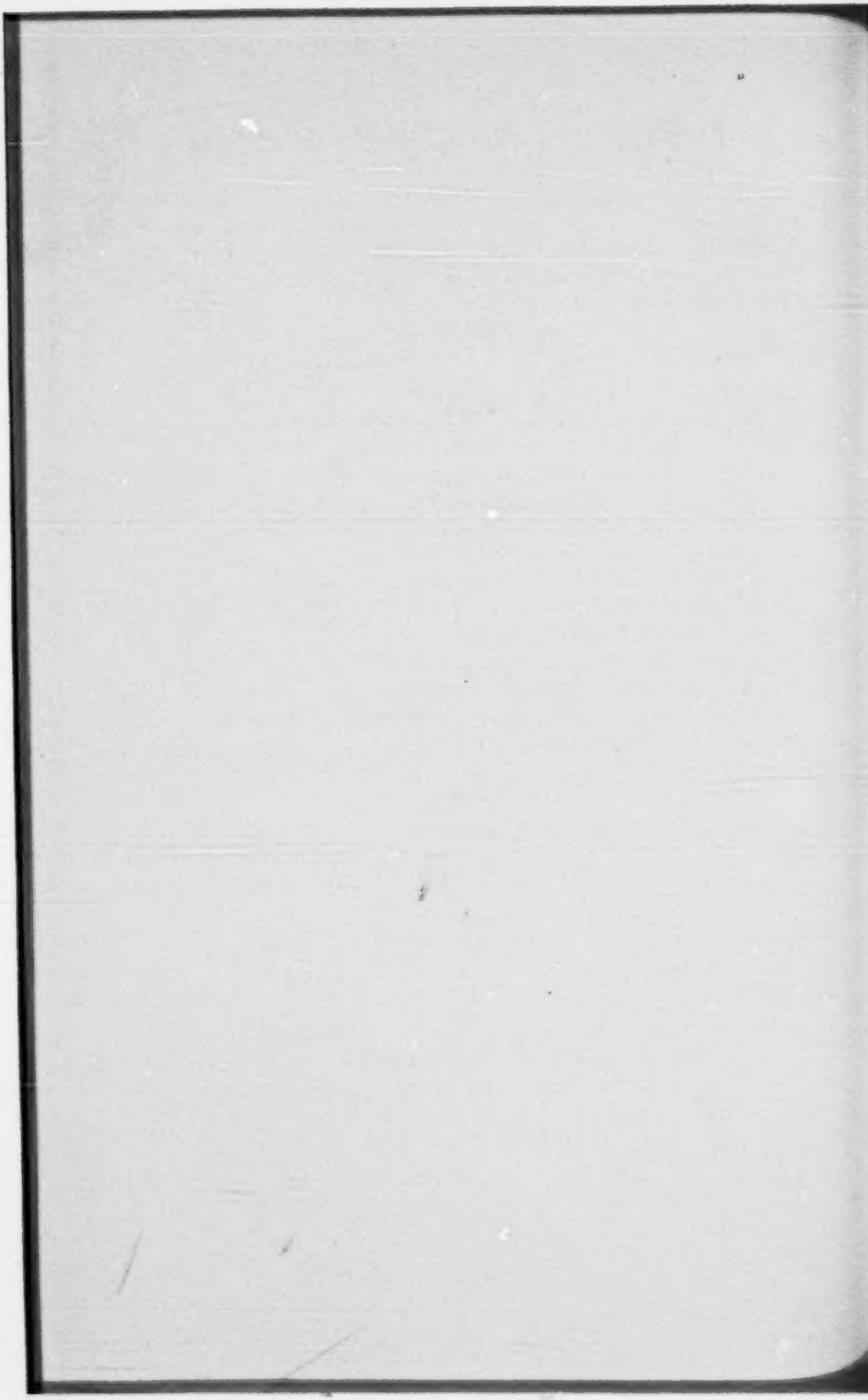

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 788

ROBERT T. ORTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 29-35, R. III, 3-9) [1] has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1955 (Pet. 29, R. III, 11). The petition for a writ of certiorari was filed on May 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence sufficiently established (a) one overall conspiracy, and (b) petitioner's participation in the conspiracy.

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[1] The record references are to the complete record in the court below which is in three volumes.

2. Whether the trial court's supplemental "Allen" charge was improper either because of its wording, its timing, or the fact that it was given without the repetition of the previously given instructions as to presumption of innocence and burden of proof.

STATEMENT

The petitioner was convicted under an indictment alleging a conspiracy with others to manufacture, remove, and conceal distilled spirits in violation of the internal revenue laws. Twenty-nine overt acts were charged, including the operation of illicit distilleries in Nansemond County, Virginia and Hertford County, North Carolina. (R. I, 2-9, R. II, 359.) Petitioner was sentenced to serve three years in prison and to pay a fine of five hundred dollars. (R. I, 10.) On appeal the judgment was affirmed.

The pertinent facts adduced at trial may be summarized as follows:

The petitioner and two of the eight co-defendants, Pierce and H. E. Hoffler, formed a partnership in 1952 for the ostensible purpose of dealing in second-hand cars (R. II, 21, 22). Its license was cancelled in January 1953 (R. II, 22). On October 2, 1952, defendant Hoffler purchased a 1940 Ford sedan, which was "souped up" for high speed driving and registered in the name of a fictitious person (R. II, 28, 38-39, 180-182). On August 19, 1952, defendant Pierce, in the company of the petitioner, purchased a 1947 Ford truck in a fictitious name (R. II, 23, 63-65, 77-80, 127). The petitioner, Pierce, and

Hoffler were together when this truck was traded for a 1948 International truck which was also registered in the name of a fictitious person (R. II, 25, 95, 97-98, 125, 179). The International truck was used by Pierce in hauling large quantities of rye meal purchased in a fictitious name (R. II, 8-12) and was seized on April 16, 1953, by county police in West Norfolk, loaded with illegal liquor (R. II, 124-126). The 1940 Ford sedan was seized by United States agents on a raid of an illicit distillery in Nansemond County on May 14, 1953 (R. II, 16, 33-34), during which four other co-defendants were arrested (R. II, 50-51). On April 29, 1953, the petitioner and Pierce were seen in Portsmouth, Virginia, hauling liquor in yet another automobile (R. II, 129, 131).

About March 1, 1953, Pierce talked with a North Carolina farmer about locating a still on the latter's farm in Hertford County (R. II, 145-146). After the Nansemond County, Virginia, seizure, about June 1, 1953, Pierce returned to North Carolina, set up the still and made rental payments to the farmer (R. II, 146). Denby (previously arrested at Nansemond County) also appeared and made rental payments to the North Carolina farmer (R. II, 147-148). This still was seized on July 26, 1953 (R. II, 44-53, 167-173). Among the men arrested at this time was Roughton, previously arrested at Nansemond County, Virginia (R. II, 37, 148).

The judge instructed the jury with regard to the law of the case, specifically charging it, toward the

end of his instructions, on the presumption of innocence and the burden resting upon the prosecution to prove guilt beyond a reasonable doubt (R. II, 332-347). About an hour and a half after the jury began deliberation, the judge, after consulting with counsel, recalled the jury and gave an additional instruction as follows (R. II, 354-355):

> I want you to know that in a large proportion of cases absolute certainty cannot be expected; and although the verdict must be the verdict of each individual juror and not just a meek acquiescence in the conclusions of his fellow jurors, yet each of you should examine the question submitted with candor and with proper regard and deference to the opinions of each other. It is the duty of jurors to decide cases if they can conscientiously do so. You should listen with the disposition to be convinced to each other's arguments. If much the larger number are for conviction, a dissenting juror should consider whether his doubt is a reasonable one which made no impression upon the minds of so many men equally honest and equally intelligent with himself. If, on the other hand, the majority is for acquittal, the minority should ask themselves whether they might not reasonably doubt the correctness of a judgment which is not concurred in by the majority. And, as I said before, while undoubtedly the verdict of the jury should represent the opinion of each individual juror,

it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views and by arguments among the jurors themselves. A juror should listen with deference to the arguments and with a distrust of his own judgment if he finds a large majority of the jury taking a different view of the case from what he does himself. Every juror should not go to the jury room with a blind determination that the verdict shall represent his opinion of the case at that moment or that he should close his ears to the arguments of men who are equally honest and intelligent with himself.

ARGUMENT

1. The petitioner contends that the proof below established two disconnected conspiracies in variance from the one alleged (Pet. 21-23), and that the evidence was insufficient to connect him with any conspiracy (Pet. 24-26). However, evidence of the associations between the offenders and their recurring involvements in the overt acts alleged in Nansemond County, Virginia, and Hertford County, North Carolina, and elsewhere shows that there was one continuing conspiracy—to make, remove, and conceal illegal non-tax-paid whiskey, however and wherever it could successfully be done. For this reason the case of *Kotteakos* v. *United States*, 328 U. S. 750, cited by the petitioner, in which the evidence proved eight or more different

conspiracies by separate, unconnected groups of defendants, is inapposite. In the instant case, the jury was entitled to infer [2] that all the defendants, and specifically the petitioner, joined in an "overriding scheme" and that each participant knew "he was aiding in a larger plan." *Blumenthal* v. *United States,* 332 U. S. 539, 559.

The evidence was also sufficient to establish the guilt of the petitioner—indeed, to show that he played a significant role as an original conspirator. He was a partner in a business venture that did no apparent legitimate business (R. II, 230, 297-299); he went with members of the partnership to acquire cars later used or traded for those used in illicit distilling (R. II, 77-80, 97-98), and he fled the law together with a partner when caught hauling liquor (R. II, 130-131).

2. The petitioner charges error on the part of the trial court in giving its supplemental instruction to the jury (Pet. 10-21). He does not deny that the rule recited therein is that laid down by this Court in *Allen* v. *United States,* 164 U.S. 492, 501, but complains that the language goes beyond that of the instruction approved by that case to include language of this Court's opinion upholding the charge.[3] The particular words in the approved

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[2] The trial judge correctly charged the jury with respect to the question of fact as to the existence of separate conspiracies (R. II, 341-342).

[3] Apparently the language of the charge objected to in this case begins "And, as I said before, while undoubtedly the verdict of the jury should represent the opinion of each individual juror * * *" [See Statement, *supra,* pp. 4-5.]

instruction, of course, are not mandatory; the additional language is nothing more than an explanation and justification of the standard and approved charge, as stated by this Court. As the court below pointed out, it is good sense and good law and the trial court was justified in following it.

In attacking the charge, petitioner relies on *Stewart* v. *United States,* 300 Fed. 769, 785-876 (C. A. 8), which did criticize the use of language from the *Allen* opinion as distinct from the *Allen* charge itself. However, in the *Stewart* case the judge, before giving the supplemental charge, had elicited from the jury the information that there was a larger preponderance one way. In the instant case there was no intimation by the jury of any difficulty in reaching an agreement and no improper inquiry was made by the judge. See *Burton* v. *United States,* 196 U. S. 283. In this connection the Court of Appeals for the Second Circuit, in *United States* v. *Samuel Dunkel & Co.,* 173 F. 2d 506, 508-509, certiorari denied, 340 U.S. 930, made the following observation:

> * * * The practice followed here of discussing the dissenting jurors' responsibilities and duties in the language of Allen v. United States, supra, was also employed, in similar form, in United States v. Allis, C. C. Kan., 73 F. 165, 182, affirmed Allis v. United States, supra. As a matter of fact this charge has been often so used. United States v. Winters, 2 Cir., 158 F. 2d 674; Bord v. United States, 76

> U. S. App. D. C. 205, 133 F. 2d 313, certiorari denied 317 U. S. 671, 63 S. Ct. 77, 87 L. Ed. 539; Boehm v. United States, 8 Cir., 123 F. 2d 791, 812, certiorari denied 315 U. S. 800, 62 S. Ct. 626, 86 L. Ed. 1200. In Stewart v. United States, 8 Cir., 300 F. 769, some criticism of use of the Allen opinion in this form was expressed. We think, however, as we have previously said, that any jury unable to maintain its individual and collective independence against such a charge, standing by itself, "would have been no better than a sounding board for any judicial whisper." United States v. Olweiss, 2 Cir., 138 F. 2d 798, 801, certiorari denied Olweiss v. United States, 321 U. S. 744, 64 S. Ct. 483, 88 L. Ed. 1047. * * *

See also *Dwyer* v. *United States,* 17 F. 2d 696, 698 (C.A. 2), certiorari denied, 274 U.S. 756; *Shaffman* v. *United States,* 289 Fed. 370 (C. A. 3).

That the charge was a supplemental instruction was made clear to the jury by the judge who said (R. II, 354):

> I have in mind to give you one additional charge, which does not relate to the facts of the case in any way or the applicable law, but somewhat on the situation with respect to juries and their duties.

There was thus no need as petitioner argues (Pet. 16) to repeat any part of the main charge given only one and one-half hours earlier.

Petitioner's objection to the time when the instruction was given (Pet. 10-12) is an afterthought. The judge consulted with all counsel before making the charge and there was no objection (R. 356). After the charge was made petitioner's counsel made it clear that his objection then was directed at the wording of the charge (R. 357). Moreover, the time of recalling the jury is a matter within the discretion of the trial court. *Allis* v. *United States,* 155 U. S. 117. Here, the time of jury deliberation must be considered in relation to the issues which were not very complex.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE, 1955.

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